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In the Supreme Court of the United States

OCTOBER TERM, 1986

KALIMA JENKINS, *et al.*,
Petitioners,

-v-

THE STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In this interdistrict school desegregation case, the District Court found that Missouri's intentionally discriminatory school and housing policies before 1954 segregated black children into the Kansas City School District and white children into the 11 surrounding school districts; that the State's and the Kansas City District's unconstitutional actions after 1954 preserved and expanded interdistrict segregation; that the United States Department of Housing and Urban Development and its predecessors complied in the State's housing violations before 1954 and funded its housing violations thereafter; and that all these actions continue to segregate black and white children into separate Kansas City school districts today.

The District Court and the evenly

divided en banc court below nonetheless denied interdistrict school desegregation relief. They ruled that the Fourteenth Amendment does not prohibit intentional racial segregation among school districts caused by governmental actors other than the school districts themselves. Under these circumstances, this petition presents the following questions:

1. Whether, having found that Missouri intentionally segregated black children into one of the school districts in the City of Kansas City and white children into the surrounding districts, the courts below erroneously denied interdistrict relief on the ground that the State and not the surrounding school districts caused that segregation?

2. Whether, having found that Missouri and the other defendants intentionally segregated black and white

children into separate school districts before 1954 and took no steps thereafter to remedy that interdistrict segregation, the courts below erred by denying interdistrict relief without considering the continuing areawide effects of the defendants' post-1954 segregative conduct?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants/cross-appellees (now petitioners):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antoria Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Sheila Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and the class of black and white present and future students in the Kansas City, Missouri School District.

Appellant/cross-appellees (now petitioners) the Kansas City, Missouri School District and Dr. Claude Perkins, then-Superintendent.

Appellant/cross-appellee Kansas City, Missouri Federation of Teachers, Local 691

Appellees/cross-appellants:

The State of Missouri

Honorable John Ashcroft, Governor of the State of Missouri

Arthur L. Mallory, Commissioner of Education of the State of Missouri

Wendell Bailey, Treasurer of the State of Missouri

The Missouri State Board of Education:

Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Delmar A. Cobble
Grover Gamm
Jimmy Robertson
Robert L. Welling
Donald E. West

Appellees:

Park Hill School District R-5 and Dr. Merlin A. Ludwig, Superintendent

North Kansas City, Missouri School District and Dr. Raymond Waier, Superintendent

School District of the City of Independence and Dr. Robert Henley, Superintendent

Raytown, Missouri Consolidated School District C-2 and Dr. Robert Atkin, Superintendent

Center School District and Donald Richmond, Superintendent

Hickman Mills Consolidated School District C-1 and Blaine E. Steck, Superintendent

Grandview Consolidated School District C-4 and Dr. Tony L. Stansberry, Superintendent

Fort Osage School District R-1 and Victor Gragg, Superintendent

Lee's Summit Reorganized School District R-7 and Dr. Bernard C. Campbell, Superintendent

Blue Springs Reorganized School District R-4 and Dr. Gale T. Bartow, Superintendent

Liberty School District and Dr. Ronald L. Anderson, Superintendent

United States Department of Housing and Urban Development and Secretary Samuel Pierce

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No. 86-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KALIMA JENKINS, et al.,

Petitioners,

-v-

THE STATE OF MISSOURI, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, KALIMA JENKINS, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming by an equally divided en banc vote the denial of interdistrict school desegregation relief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 807 F.2d 657, is set out in the Appendix, 2a. The unpublished June 5, 1984 order of the United States District Court for the Western District of Missouri is at 274a. The September 17, 1984 decision of the District Court, reported at 593 F. Supp. 1485, is at 518a.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on December 5, 1986, and denied rehearing on February 5, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Preliminary Statement.

This is an interdistrict school desegregation case. Petitioners, Kalima Jenkins et al., are the plaintiff class of public school children in the Kansas City, Missouri School District ("the Kansas City District," or "KCMSD").

The Kansas City District is one of 13 school districts located wholly or partly within the City of Kansas City. Encompas-

sing only a fourth of the City's territory but all of its predominantly black neighborhoods, the Kansas City District is 68 percent black. Its professional staff is 53 percent black. Exhibits (X) 9, 36, 53G, 3757. Surrounding the Kansas City District on three sides and encompassing most of the remaining three-fourths of the City of Kansas City are the respondent school districts. Those 11 districts have a combined student population less than five percent black and a professional staff less than one percent black. Together, the Kansas City District and the 11 surrounding districts have a student body less than 25 percent black.[1]

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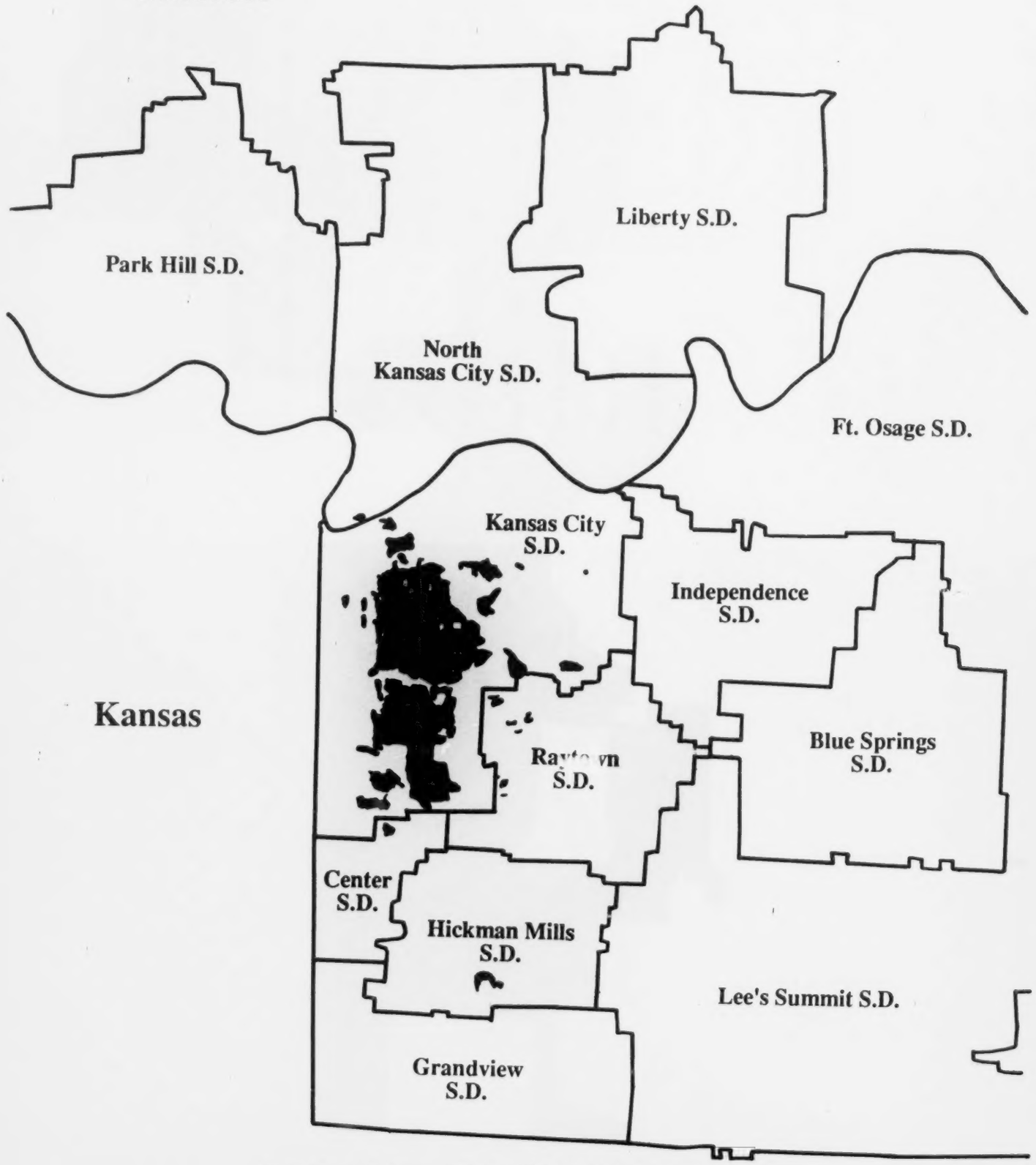
[1]X 9, 36, 53G, 721G. Also referred to here as the "surrounding school districts" and the "SSDs," the 11 respondent districts are the Blue Springs, Center, Fort Osage, Grandview, Hickman

City of Kansas City and Twelve Area School Districts

Missouri School District boundaries in blue
City of Kansas City, Missouri in yellow
Location of census tracts where percentage of black residents exceeds 60% in brown.



Rendered from Plaintiffs' Exhibits 9 and 36

The District Court found that, for a century before Brown v. Board of Education, 347 U.S. 483 (1954), the State of Missouri (i) discriminatorily confined its de jure segregated schools for blacks to the Kansas City District while locating schools for whites throughout the Kansas City area, and (ii) enforced racially restrictive covenants in the parts of the City now served by the surrounding districts but not in the older neighborhoods served by the Kansas City District. The District Court determined that these and other intentionally discriminatory acts influenced the patterns of residential development of the metropoli-

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Mills, Independence, Lee's Summit, Liberty, North Kansas City, Park Hill, and Raytown School Districts. The State of Missouri and the United States Department of Housing and Urban Development (HUD) are also respondents. The Kansas City District is a petitioner.

tan area, had an important impact on the composition of inner city neighborhoods, and "continue[] to have a significant effect in the Kansas City area" today. September 1984 Decision, 530a-37a, 568a-69a, 601a-02a.

The District Court also found that the Missouri Legislature in 1957, the same year it repealed its mandatory school segregation laws, adopted legislation exempting Kansas City from the city/district coterminousness rule applied to other Missouri cities. But for this legislation, the 74 percent minority District of Kansas City instead would today have the same boundaries as the 73 percent white City of Kansas City and would encompass all or parts of nine of the predominantly white surrounding school districts.[2]

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[2] June 1984 Order, 334a-39a (discussing Act of July 6, 1957, 1957 Mo. Laws 454; Act of July 6, 1965, 1965 Mo. Laws 275, 276-77 (1965),

The District Court denied interdistrict relief and dismissed the surrounding school districts. It ruled that Milliken v. Bradley, 418 U.S. 717 (1974), prohibited those districts' inclusion in a remedy for Missouri's intentional segregation of white children into those districts and black children into the Kansas City District because the State and not the surrounding districts caused the segregation.

The United States Court of Appeals for the Eighth Circuit sitting en banc affirmed by an evenly divided vote: Four judges (Judge Gibson, joined by Judges

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codified, Mo. Rev. Stat. §§ 162.563, 162.571). But for this legislation, the Kansas City District automatically would have quadrupled in size and become coterminous with the City of Kansas City in 1970. All the respondent school districts except Blue Springs and Fort Osage lie wholly or partly within the City of Kansas City. Three of the City's 13 school districts are not part of this suit. See map, supra.

Ross, Fagg, and Wollman) voted to affirm. Based on their reading of Fourth, Fifth, and Sixth Circuit precedents, those judges interpreted Milliken v. Bradley to immunize governmentally sponsored racial discrimination from constitutional cure so long as the resulting segregation affects school districts not themselves responsible for causing it. P. 30, infra. Four judges (Chief Judge Lay, joined by Judges Heaney and McMillian, and Judge Arnold) voted to reverse. Applying the rule of the Third and Seventh Circuits, those judges concluded that, if the State of Missouri intentionally segregated black children out of the surrounding districts and into the Kansas City District, then Brown and Milliken obligate the State to cure that segregation whether or not the surrounding districts helped create it.

Pp. 31-33, infra.

The inconclusive en banc judgment below leaves the constitutional rights of the plaintiff class in legal limbo and 36,000 plaintiff children in racially segregated schools. It also leaves the six judicial circuits that have addressed the question in conflict and metropolitan areas throughout the Nation in confusion as to the dispositive legal standards under Milliken. This petition presents issues of sufficient public importance to warrant the Court's plenary consideration.

II. The District Court's Interdistrict Violation and Effect Findings

Trial of this case began in October 1983. In the middle of trial, the Court granted the surrounding school districts' motions to be dismissed under Fed. R. Civ.

P. 41(b) and denied interdistrict relief. After trial, the District Court dismissed HUD but ruled that the State of Missouri and the Kansas City District were guilty of intentional racial segregation with effects in both the Kansas City District and the school districts surrounding it. The Court nonetheless denied interdistrict relief.

Consistent with its interpretation of Milliken v. Bradley, the District Court separated its interdistrict violation/effects findings into two sets. The first set, announced during trial in the District Court's unpublished June 1984 Order, considers the intentional violations of only the 11 respondent school districts and the effects of those violations on only the Kansas City District. 274a. The second set of findings,

announced after trial in the District Court's published September 1984 Decision, considers the constitutional violations committed by the State of Missouri, the Kansas City District, and HUD and the effects of those violations on both the Kansas City District and the surrounding districts. 518a.

Explaining why it dismissed the surrounding school districts before reaching a conclusion about the effects of the violations committed by Missouri and the other defendants, the District Court stated that "[t]he linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each district that substantially caused segregation in another district." June 1984 Order, 285a (citing Milliken, supra). The District Court accordingly held as a

matter of law that "[w]hether plaintiffs' evidence [is] sufficient to sustain a finding of liability against other actors . . . is irrelevant to the instant motions to dismiss filed by each SSD defendant." The absence of complicity by the surrounding districts in "the actions of those responsible for shaping [segregated] patterns," the District Court concluded, "forbids a finding of liability against the SSDs to remedy any racial imbalance [within those districts] that may be attributed to [the other] actors."[3]

A. The State's Violations and Their Effects

De Jure School Segregation. Below, "[t]he State admitted and the [District] Court judicially noticed that Missouri

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[3]June 1984 Order, 508a-09a. Accord, e.g., Trial Transcript (T) 24,561-62 (court's statement the last day of trial explaining its previous dismissal of the surrounding districts: "But I

mandated segregated schools for black and white children before 1954." 530a. (Citations in this section are to the District Court's September 1984 Decision, unless noted.)

During the 90 years when Missouri law mandated school segregation, the State's black population was widely dispersed throughout tens of thousands of one-room school districts. X 184, 208-12, 2322. Instead of heeding those districts' periodic requests to be allowed to educate their black and white children together in the limited facilities available, Missouri enacted a series of statutes requiring districts with small numbers of black

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was bound by law, as I read it at the time, that you cannot require an entity to be part of the [interdistrict] remedy unless you found a constitutional violation on the part of that entity").

children to transfer them at State expense to neighboring districts that had collected enough blacks to justify constructing a separate school. KCMSD Petition, 3-7 & nn. 8-18 (collecting statutes and record citations). The District Court found that "[e]ach school district in Missouri participated in this dual school system before it was declared unconstitutional in Brown I. Districts with an insufficient number of blacks to maintain the state-required separate school made interdistrict arrangements to educate those children." 531a-32a.

In 1900, 22 percent of the 7,000 black public school students in the Kansas City area lived outside the Kansas City District and within 55 predecessors of 10 of the 11 "Reorganized" or "Consolidated" respondent districts. Six of those

districts (Blue Springs, Center, Fort Osage, Grandview, Hickman Mills, and Raytown) never operated schools of any sort for black children prior to Brown; a seventh (Lee's Summit) closed its only black school in 1910; an eighth and ninth (North Kansas City and Park Hill) never operated high schools for black children; and all 11 lacked a high school for black children at the time of Brown. By contrast, the State required the Kansas City District to operate a full complement of segregated schools for black children throughout the pre-Brown period, and those schools received black children -- sometimes by the busload -- from at least seven respondent school districts. June 1984 Order, 372a-476a; Opn. of Lay, C.J., 211a-14a & n.9; X 37-39, 49, 49B, 53E, 1830-40.

The District Court attributed two effects to the state-mandated and state-

financed "interdistrict system of locating dual schools." Opn. of Gibson, J., 49a. First, the District Court found that black families "[u]ndeniably" moved from the respondent districts "to districts, including the KCMSD, that provided black schools."[4]

More importantly, the District Court found that the interdistrict dual school system diverted into the Kansas City District and away from the surrounding school districts "the great[] influx of blacks" migrating to the Kansas City area from southern and border states during the two World Wars. 533a. Noting the importance of "[e]conomic and job opportunities . . . in black migration," the court found that "[o]ften jobs would pull migrants to

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[4]531a-32a. See Opn. of Lay, C.J., 247a-50a & n.18. In 1900, the SSDs had 22% of the area's 7,000 black children; in 1954, they had 2.5%. In 1900, the proportion of black students in the

the city and then availability of schools would influence, more specifically, what housing choices would be made within the city."[5]

The District Court concluded that "Missouri's legacy" of dual schools "'influence[d] the patterns of residential development of [the] metropolitan area and ha[d] important impact on composition of inner city neighborhoods,'" and "that segregated schools, a constitutional violation, has led to white flight from the KCMSD to [the SSDs] . . . and that it has caused a system-wide reduction in student achievement in the schools of KCMSD."

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surrounding districts was nearly identical to that in the KCMSD (7% vs. 9%); by 1954, the SSDs' proportion of blacks had dropped to 1%, while KCMSD's had doubled. While losing 75% of their black student population between 1900 and 1954, the SSDs' white student population grew by nearly 300%. X 53E.

[5]534a. The District Court found that: "[T]here is an inextricable connection between schools and housing. 'People gravitate toward school facilities, just as schools are located in response to

536a-37a (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971)); August 25, 1986 Order, at 1-2. See September 1984 Decision, 555a.

De Jure Housing Discrimination. The District Court listed a number of other actions the State undertook before Brown "which were discriminatory against blacks," had "the effect of placing the State's imprimatur on racial discrimination," and "ha[d] and continue[] to have a

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the needs of the people.'" 537a (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971)). "Before 1954, access to schools was one of many reasons [in-migrating] blacks chose to move into the KCMSD" rather than the surrounding districts. 533a. "Regardless of their motivation for coming, once here, blacks settled in the inner city or, the 'principle black contiguous areas'" where the region's only "segregated facilites with segregated staffs" were located. 535a, 542a. "This immigration coupled with a high birth rate resulted in the Kansas City black population doubling from 41,574 in 1940 to 83,740 in 1960." 533a.

significant effect on the dual housing market in the Kansas City area." Id., 601a-02a (emphasis added). The Court found, for example, that: 1. Until 1953, the State's "mass enforcement" of racially restrictive covenants prevented blacks from moving into neighborhoods in all but one of the 11 surrounding districts and caused the Federal Housing Administration (FHA) until 1959 to withhold financing from housing developments in those districts with "incompatible" "racial" and "social" groups. 2. Between 1953 and 1973, the State's Land Clearance for Redevelopment Agency, with HUD funding, "practiced discrimination in relocating [13,000 households] displaced by urban renewal, steering blacks to southeastern Kansas City [served by the Kansas City District] and relocating whites throughout

the [13 school districts in the] city." 3. The State's Housing Authority of Kansas City, also with HUD funding, "explicitly segregated its housing units until 1958, . . . may have continued segregative practices until 1964," and was found by HUD in 1976 to have violated Title VI of the 1964 Civil Rights Act for the preceding eight years by not placing white families in the projects it previously had reserved "for Negro families" and black families in the projects it previously had reserved "for whites."[6]

The Court determined that the State-sponsored "dual housing market, which still exists to a large degree today, impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment." 536a-37a.

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[6]536a (citing T 12,974-75), 567-72a, 577a; Opn. of Arnold, J., 158a-65a; X 22, 3531. See X 27F (20,000 units of public and subsidized housing in Kansas City area). Finding that the State's

"The intensity of segregation is demonstrated by the fact that the average black family [in the KCMSD] lives in a census

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enforcement of racial covenants affected economic "realities," the District Court concluded that "FHA did not act arbitrarily []or capriciously in giving [those] covenants consideration" in administering its housing subsidy and accordingly that the agency is not constitutionally liable for its explicitly racial policies of the 1930s, 1940s and 1950s. 566a, 569a. Four of the eight judges below voted to reverse the District Court on this point. Opn. of Lay, C.J., 216a-19a; Opn. of Arnold, J., 163a n.10. The District Court and Judge Gibson also excused HUD for knowingly funding the State's discriminatory relocation and public housing policies in the 1940s-1960s because (i) HUD-funded housing is located throughout the Kansas City area and (ii) HUD took steps in the mid-1970s to end those discriminatory policies. 573a-78a. Judge Arnold comments: "Both of these points involve a misapprehension of the plaintiffs' claims: As to the first, the claim is not that unbalanced housing site selection . . . caused interdistrict segregation, but instead that once the projects were built, HAKC explicitly segregated them, or later, steered whites to some projects and blacks to others. As to the second, the plaintiffs' complaint is not primarily about HAKC and LCRA activities in the 1970s; LCRA practiced discrimination from 1953 to 1973, and the plaintiffs contend that HAKC segregated its housing units from its inception in 1939 . . . ." Opn. of Arnold, J., 173a-74a. Accord, Lay, C.J., 216a-19a.

tract that is 85% black while the average white family [in the SSDs] lives in a census tract that is 99% white." 535a (citing T 14,739, 14,745).

Affirmative Duty Violations. Measuring the State's post-1954 conduct by its "'effectiveness, not [its] purpose'" in "'decreasing or increasing the segregation caused by the dual system,'" the District Court found that "the State as a collective entity . . . fail[ed] to affirmatively act to eliminate the structure and effects of its past dual system." 605a, 611a (quoting Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979)). In particular, the District Court cited the General Assembly's failure to enact legislation to "abolish or create school districts" or, if "necessary . . . change them" in a desegregative manner. 607a-

08a. Prominent among the State's post-1954 defaults in this regard was its enactment in 1957 of H.B. 171, discussed at p. 6, supra. See also June 1984 Order, 316a-52a (other post-1954 segregative actions).

B. Findings As To The 11 Surrounding Districts

In keeping with its interpretation of Milliken, the District Court in its June 1984 findings held the surrounding districts responsible only for those aspects of Missouri's interdistrict dual system for which the districts, and not the State, had primary responsibility. Sifting the evidence, the Court held the surrounding districts responsible only for the modestly "blackening" effect on the Kansas City District of blacks moving from the surrounding districts and not for the

nearly complete "whitening" effect on the surrounding districts themse'ves (see note 4, supra), or for the dual system's diversion of thousands of in-migrating blacks exclusively into the Kansas City District. The Court concluded that the effects it did attribute to the surrounding districts were "de minim[i]s."[7]

The District Court next found the surrounding districts innocent of any housing violations and refused as a matter of law "to find the SSDs liable for racial imbalance" in their districts "that may be attributed to policies or practices of [state] housing actors." 370a-71a. The Court likewise refused to consider the effects in those districts of the State's

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[7] "[P]laintiffs had to prove first that the segregated schools existing before 1954 were the direct and substantial cause of blacks leaving each defendant district; second, assuming that occurred, that it had a significant segregative effect in the KCMSD. Plaintiffs' proof was weak, speculative and in any event de minim[i]s." 301a (emphasis added; citations omitted). Accord,

post-1954 affirmative-duty violations.[8]

Having ruled irrelevant to the surrounding districts and to plaintiffs' interdistrict claims (i) the major segregative consequences of the State's pre-1954 interdistrict dual school system, (ii) all the multidistrict effects of the State's and other parties' area-wide housing violations, and (iii) the City-wide effects of the State's post-1954

Opn. of Gibson, J., 49a. Applying a different interpretation of Milliken, Chief Judge Lay took a wider view of the surrounding districts' role in the interdistrict system: "[U]nder the pre-1954 dual school system the SSDs exercised their discretion, granted them by the state, either to provide schools for black students which offered at best a substandard education or to decline to provide any schools at all. Instead, the SSDs transferred black students to the KCMSD. . . . Not only did the SSDs thus create segregated conditions in their individual districts by emptying their districts of all black school children, but they set historical precedent for interdistrict transfer of students on the basis of race in the Kansas City metropolitan area." 225a-26a.

[8]September 1984 Decision, 605a-08a. The District Court found that, by 1960, each SSD had "dismantl[ed] [its] dual system" by "sending its

freezing of the Kansas City District's boundaries, the District Court held that

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students to school without regard to race." 503a. (As of 1954, the 11 surrounding school districts had about 200 black children left, to be integrated with 20,000 white children. X 53.) Based on this "unitariness" finding, the District Court exonerated the SSDs of any liability for the various actions it found those districts took after 1954 without segregative intent but with massive segregative effects. 316a-52a. In particular, while successfully supporting passage of H.B. 171 and other legislation making it virtually impossible for the Kansas City District to annex the predominantly white areas surrounding it, the SSDs actively and successfully opposed four legislative proposals for desegregative school-district reorganization; at least seven plans for integrative student exchanges, including two by the United States Civil Rights Commission (in 1977 and 1981) and two by the Kansas City District (in 1969 and 1975); and three proposals to increase minority and government-subsidized housing opportunites in their jurisdictions. 316a-52a, 371a-72a, 377a, 381a, 389a, 398a-99a, 409a, 461a, 489a-90a. Likewise, in 1974, the SSDs in the City of Kansas City would not accept proceeds from a citywide 1/2-cent sales tax for education until the City Assessor assured one of them in writing that, by taking the money, they were not committed to participating in desegregative interdistrict transfers between themselves (at the time 1% black) and the Kansas City District (at the time 58% black). 318a-20a. See X 53G, 1763, 1766. Four judges dissented from the District Court's handling of these issues. Opn. of Lay, C.J., 256a-58a; Opn. of Arnold, J., 165a-66a.

the current effects of the few violations it did consider were "legally insufficient to justify the relief sought against the suburban school district defendants." 499a. So, too, having concluded that SSD innocence precluded interdistrict relief, the District Court expressly refused to consider the "cumulative" interdistrict effects of the other parties' violations. 498-99a. See Opn. of Arnold, J., 146 n.1, 157a-58a, 164a.

III. Post-Trial Proceedings

The District Court refused to include the surrounding districts in a remedy for the explicitly interdistrict violation and effects it found because, in its view, the State's violations gave the Court "no power to restructure the operation of [the dismissed surrounding districts] absent a

constitutional violation by those entities." September 1984 Decision, 608a.

Having barred interdistrict desegregation relief, the District Court also ruled out mandatory intradistrict desegregation measures, fearing that reassignment of students within the Kansas City District would cause its few remaining white students to flee. Instead, the District Court ordered the State in June 1985 to pay all the tuition and transportation costs of any KCMSD black child who wished to transfer to a school in any of the surrounding school districts that voluntarily agreed to accept black transfers from the KCMSD. Jenkins v. Missouri, 639 F. Supp. 19, 35-39 (W.D. Mo. 1985).

In the 22 months since the District Court issued its June 1985 voluntary-interdistrict-transfer proposal, nearly

ten thousand black parents in the Kansas City District have expressed interest in having their children transfer to schools in the respondent school districts, and plaintiffs and the Kansas City District have announced their willingness to drop the litigation if those districts would agree to accept some of those black children. Nonetheless, each of the 11 respondent districts on four separate occasions during that 22-month period has formally refused to accept black KCMSD children into any of its underutilized schools.[9]

On December 5, 1986, the United

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[9] E.g., 639 F. Supp. at 51. The District Court also ordered the State and the Kansas City District to undertake a number of compensatory education programs within the Kansas City District designed to alleviate the harmful educational effects of prior discrimination. Id. at 26-35.

States Court of Appeals for the Eighth Circuit, which heard the appeal en banc, affirmed the District Court's denial of interdistrict relief by an equally divided court. Relying on decisions of the Fourth, Fifth, and Sixth Circuits, Judge Gibson "'decline[d],'" to accept "'the argument that a school board otherwise innocent of segregative intent is liable [to participate in remedying] the discriminatory . . . practices of other governmental agencies.'"[10] Affirming the District Court's interpretation of Milliken, Judge Gibson cited only the District Court's June 1984 findings on the SSDs' conduct and not the September 1984 findings on the effects in those districts of the State's violations.

Judge Arnold dissented in part.

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[10]Opn. of Gibson, J., 67a (quoting Bell v. Board of Education, 683 F.2d 963, 968 (6th Cir. 1982)). See, e.g., id. 26a (interdistrict relief is a "'wholly impermissible remedy'" for "'out-

"[T]ak[ing] as established" the contrary rule of the Third and Seventh Circuits "that a school district can be made to participate in an interdistrict remedy even if it is not 'personally' guilty of violating the Constitution, that such relief is appropriate where a State's constitutional violations have contributed to interdistrict segregation, . . . and that there is nothing unique or peculiar about [State] housing agencies that would take them out of this rule," Judge Arnold

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lying districts not shown to have committed any constitutional violations'"); 100-04. "Limit[ing] to its facts" contrary en banc precedent of the Eighth Circuit, Judge Gibson concluded that, while "imposition of an interdistrict remedy on the innocent SSDs" may be appropriate when the State was guilty of "racial gerrymandering" of the sort that leaves black and white families where they are and draws boundary lines between them, interdistrict relief is not appropriate if the State, but not the SSDs, left existing boundary lines where they were and caused black and white families to relocate on opposite sides of the lines. 69a-72a n.19 (distinguishing Morrilton School District No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979) (en banc)). But see Opn. of Lay, C.J., 203a-04a; Opn. of Arnold, J., 153a-55a & n.5.

concluded that "the case should be remanded to the District Court to determine precisely what current interdistrict segregative effects may be attributed to housing discrimination by the State" and to devise "a remedy including each affected SSD:"

> [I]n accord with the equitable principles that govern such remedies, Milliken, 418 U.S. at 737-38, the role that may be assigned to each SSD may be limited by the fact that the SSD is not itself a constitutional violator. . . . On the other hand, it seems clear that affected SSDs could be required to participate in an interdistrict transfer program designed to make the racial composition of the districts' schools what it would have been absent official . . . discrimination.

151a, 176a-78a.

Chief Judge Lay for himself and Judges Heaney and McMillian agreed with Judge Arnold "that school districts which were not themselves found to be con-

stitutional violators nevertheless [may] be included in interdistrict relief where the effects of the unconstitutional actions of . . . the state were felt in those school districts." 198a. Voting to remand, Chief Judge Lay concluded that "the district court's own factual findings with regard to the constitutional violations of the state and KCMSD, especially with regard to the significant link between housing patterns and school availability in the Kansas City metropolitan area, strongly suggest that the plaintiffs are entitled to an interdistrict remedy." 269a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS THAT HAVE ARISEN OVER WHETHER MILLIKEN v. BRADLEY PERMITS STATE OFFICIALS DELIBERATELY TO SEGREGATE A SINGLE CITY'S CHILDREN INTO SEPARATE SCHOOL DISTRICTS SO LONG AS THE STATE AND NOT THE SURROUNDING WHITE DISTRICTS IS TO BLAME FOR THAT SEGREGATION

A. The Court Should Grant Certiorari to Resolve the Conflict Between the Judgment Below and its Decision in Milliken v. Bradley

In Milliken v. Bradley, 418 U.S. 717 (1974), the Court declared that "no state law is above the Constitution. School district lines and the present laws with respect to local control are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." Id. at 744. Based on this principle and the rule that the scope of the remedy is determined by the nature and extent of the constitutional violation, the Court established the following guidelines for interdistrict relief:

> Before the boundaries of separate and autonomous school districts may be set aside . . . by imposing a cross-district remedy, it must first be shown

> that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

Id. at 744-45 (emphasis added). The Court emphasized that plaintiff school children may satisfy this standard by "showing that either the State or any of the . . . outlying districts engaged in activity that had a cross-district effect." Id. at 748 (emphasis added). The Milliken majority thereupon denied relief because the record before the Court contained "evidence of de jure segregated conditions only in the Detroit schools" "and not elsewhere, and on this record the remedy must by limited to that system." Id. at 745, 746 (emphasis added).

Joining the five-person majority, Justice Stewart wrote separately "to state briefly [his] understanding of what . . . the Court decides today." Id. at 753 (Stewart, J., concurring). Agreeing that interdistrict relief in the Detroit area was inappropriate because the violations "occurred . . . within a single school district whose lines were coterminous with those of the city of Detroit," id., Justice Stewart nonethless declared that an interdistrict remedy "would . . . be proper, or even necessary," if it were "shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines; by transfer of school units between districts; or by purposeful, racially discriminatory use of state

housing or zoning laws . . . ."[11]

The judgments of both courts below warrant certiorari because they so directly conflict with this Court's own teachings in Milliken: Whereas Milliken authorizes interdistrict remedies whenever "discriminatory acts of the state **or** local school districts . . . cause . . . interdistrict segregation," id. at 745 (majority opinion) (emphasis added), the District Court and Judge Gibson below "rejected plaintiffs' . . . argument which would have held the SSDs liable and incorporated them in an interdistrict

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[11] Id. at 755 (emphasis added; citations omitted). In 1975, this Court summarily affirmed the decision of a 3-judge court ordering interdistrict relief premised explicitly on (i) housing as well as school, and (ii) people-moving as well as line-drawing, violations by the State of Delaware and (iii) including in the remedy districts that the district court explicitly had determined were both innocent and "unitary." Evans v. Buchanan, 393 F. Supp. 428, 432, 433-38 (D. Del.) (3-judge court) (emphasis added), aff'd, 423 U.S. 963 (1975).

remedy on the basis" of "wrongs committed by . . . the state" and held that interdistrict relief is available only if there has been "a racially discriminatory act by each defendant" district. June 1984 Order, 497a, 285a (emphasis added). See Opn. of Gibson, J., 63a-64a, 67a.

Whereas Justice Stewart, casting the deciding vote in Milliken, concluded that an interdistrict remedy would "be proper, or even necessary, . . . [w]ere it to be shown, for example, that state officials had contributed to the separation of the races by . . . racially discriminatory use of state housing or zoning laws," id. at 755 (Stewart, J., concurring), the District Court and four members of the court below flatly refused to "find the SSDs liable for [inclusion in a remedy for] racial imbalance that may be attributed to policies or practices of inde-

pendent housing actors." June 1984 Order, 371a. Accord, e.g., id., 508a-09a; Opn. of Gibson, J., 67a.

Certiorari is appropriate "[w]hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court." S. Ct. R. 17.1(c). This is such a case.

B. The Court Should Grant Certiorari to Resolve the Conflict Among the Third, Fourth, Fifth, Sixth, and Seventh Circuits Over the Proper Interpretation of Milliken

Applying the standards set out in Milliken, two circuit courts of appeals and a district court in another circuit have concluded that the Fourteenth Amendment authorizes interdistrict remedies when the State intentionally causes multidistrict segregation, notwithstanding the lack of complicity in the violation by school districts included in the remedy. The Third Circuit twice has held that

interdistrict relief is required "[w]here the State has contributed to the separation of races" and that "exclusion of the suburban districts [from the remedy] cannot be predicated on their own purported innocence."[12] The Third Circuit has expressly applied this rule to predicate interdistrict relief (i) on housing as well as school segregation violations, (ii) on violations of a people-moving, as well as a line-drawing, sort, and (iii) as a basis for consolidating out of existence surrounding districts that the district court not only found "innocent" of the interdistrict violation but also had pre-

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[12] Evans v. Buchanan, 416 F. Supp. 328, 340 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977) (en banc). Accord, Hoots v. Commonwealth, 672 F.2d 1107, 1121 n.13 (3d Cir. 1982) ("[t]he district court also properly held that the State and County Boards violated the constitution . . . and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process").

viously adjudicated "unitary."[13]

Likewise, the Seventh Circuit twice has upheld interdistrict remedies based on the rule that:

> The suburban school officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. . . . Thus, if state discriminatory housing practices have a substantial interdistrict effect, it is appropriate to require school authorities to remedy the effects even though they did not

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[13] Evans v. Buchanan, 582 F.2d 750, 762-63 n.11 (3d Cir. 1978) (en banc) (affirming interdistrict relief based upon "eight separate interdistrict violations," four of which involved housing actions and seven of which involved governmental actions that left existing school district boundary lines intact and caused blacks and whites to relocate on opposite sides of those lines (emphasis in original)); Evans v. Buchanan, 416 F. Supp. 328, 339 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977) (en banc) (surrounding districts may be included in an interdistrict

> themselves cause this aspect of school segregation.[14]

The views of the four judges who concurred in the judgment below and the District Court opinion they affirmed directly conflict with these holdings of the Third and Seventh Circuits. That conflict, in turn, divides those judges from their numerically equal dissenting collegues, who voted to apply the law of the Third and Seventh Circuits and to reverse.

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remedy even though "each" is "at present operating a unitary system," if "the State . . . acted in a [discriminatory] fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in [those] districts"). Accord, United States v. Scotland Neck Board of Education, 407 U.S. 484, 490 (1972) ("desegregation is not achieved by . . . two . . . systems, each operating unitary schools within its border, where one of the two systems is, in fact, 'white' and the other is, in fact, 'Negro'").

[14] United States v. Board of School Commissioners of the City of Indianapolis, 573 F.2d 400, 410 (7th Cir. 1978). Accord, United States v. Board of School Commissioners, 637 F.2d 1101,

Also in conflict with the Third and Seventh Circuit holdings are the views ascribed to the Fourth, Fifth, and Sixth Circuit by the lead opinion below. For example, Judge Gibson quoted the Sixth Circuit's statement that:

> "We do not find any case addressing the argument that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies. We decline to accept this argument."[15]

Judge Gibson also relied on decisions

1109-11, 1115 (7th Cir. 1980) ("the power to order students from [the suburban] districts to transfer to [Indianapolis] schools . . . depends not on the culpability, or lack thereof, of the suburban districts involved but rather on the finding that discriminatory actions by the state had a significant segregative impact across district lines" (emphasis added)). A district court in the Sixth Circuit recently adopted the Third and Seventh Circuit views with regard to school violations. Bronson v. Board of Education, 578 F. Supp. 1091, 1098-99 (S.D. Ohio 1984). The Sixth Circuit's approach to housing-violation cases is discussed infra.

[15] Opn. of Gibson, J., 67a (quoting Bell v.

of the Fourth Circuit. 62a, 101a. That

Board of Education, 683 F.2d 963, 968 (6th Cir. 1982)). Accord, Bronson v. Board of Education, 578 F. Supp. 1091, 1104-05 (S.D. Ohio 1984) ("absent a showing of a nexus between the conduct of any of the named [suburban school district] Defendants and the acts of housing authorities or other government . . . agencies responsible for shaping the residential patterns in their districts . . ., these named Defendants herein cannot be held liable for, or be responsible for remedying, any racial imbalance that may be attributed to the practices and policies of these independent actors and agencies" (emphasis in original)).

In conflict with Bell and Bronson are the following Second, Sixth and Ninth Circuit decisions premising intradistrict school desegregation relief on housing violations: Oliver v. Kalamazoo Board of Education, 640 F.2d 782, 785 (6th Cir. 1980) (racially restrictive covenants); Hart v. Community School Board, 512 F.2d 37 (2d Cir. 1975) (aff'g 383 F. Supp. 699, 747-54 (E.D.N.Y. 1974)) (public housing, urban renewal, relocation, and subsidized housing)); Ybarra v. City of San Jose, 503 F.2d 1041 (9th Cir. 1974) (zoning and building permit policies); United States v. Yonkers Board of Education, 624 F. Supp. 1276, 1289-376, 1531-45 (S.D.N.Y. 1985) (appeal pending) (public housing, subsidized housing, urban planning). See Swann, supra, 402 U.S. at 23 (reserving question "whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree"). See generally

Circuit's Richmond decision, in denying interdistrict school desegregation relief premised on housing discrimination, states: "That there has been [official] housing discrimination in all three [school district] units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage." Bradley v. School Board, 462 F.2d 1058, 1066 (4th Cir. 1972) (en banc), aff'd without opinion by an equally divided Court, 412 U.S. 92 (1973). More recently, the Fourth Circuit denied interdistrict relief premised on both school and housing allegations, because "[a]n independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial

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Note, Housing Discrimination as a Basis for Interdistrict School Desegregation Relief, 93 Yale L.J. 340 (1983).

imbalance in the other district."[16]

Certiorari is appropriate "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . ." S. Ct. R. 17.1(a). The judgment below rests on a dispositive interpretation of Milliken that directly conflicts with the clear rule of the Third and Seventh Circuits. The controlling legal issue in this case also has sundered

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[16] Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324, 328, 332 n.15 (4th Cir. 1984). Judge Gibson also relied on Fifth Circuit decisions 100a. The rule of that Circuit is unclear. Compare Taylor v. Ouachita Parish School Board, 648 F.2d 959, 969 5th Cir. 1981) (dicta) ("should interdistrict effect alone transform otherwise intradistrict unconstitutional action into an interdistrict violation, then the Milliken insistence that 'without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy,' . . . contains a redundancy"), with United States v. Texas, 321 F. Supp. 1043, 1052 (E.D. Tex. 1970), aff'd, 447 F.2d 441 (1971), cited approvingly in

the law of the Third and Seventh Circuits from that of the Fourth and (in housing-violation cases) the Sixth Circuits, divided panels of the Fifth Circuit, and left the rule of the Eighth Circuit and the rights of the plaintiff school children hanging in the balance of an evenly divided en banc court. That the proper interpretation of this Court's decision in Milliken has been the source of so much "controversy . . . ever since" reveals that the time has come for the Court to settle the question once and for all. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 (1977); Afroyim v. Rusk, 387 U.S. 253, 255-56 (1976).

Milliken, supra, 418 U.S. at 744 (ordering inter-district relief encompassing districts not guilty of any violation because "the State of Texas . . . created, and . . . participated in the continued support" of those districts as racially identifiable "administrative units").

II. The Court Should Grant Certiorari to Resolve the Conflict Between the Judgment Below and the Third and Other Circuits Over Whether the Affirmative Constitutional Duty to Dismantle the Effects of Prior De Jure Segregation Applies in Interdistrict Cases

In Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II) and predecessor intradistrict decisions, this Court held that the intentional segregation of schools in 1954 places the offending parties "under a continuing duty" thereafter "to eradicate the effects of that system," and that the systemwide nature of the violation furnishes prima facie proof that current segregation was caused at least in part by prior intentionally segregative official acts. Id. at 537 (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973); Swann, supra, 402 U.S. at 26). Part of the affirmative duty imposed by the Court's decisions "is the obligation not to take any action

that would impede the process of disestablishing the dual system and its effects." Dayton II, supra, 443 U.S. at 538 (emphasis added) (citing Wright v. Council of City of Emporia, 407 U.S. 451 (1972)).

Under Dayton II, the measure of a prior segregator's post-1954 compliance with this duty "is the effectiveness, not the purpose of the actions in decreasing or increasing the segregation caused by the dual system." 443 U.S. at 538 (emphasis added). Each instance of a failure or refusal to fulfill this affirmative duty "continues the violation of the Fourteenth Amendment," and the effects of each such "continuing" violation count as much in determining the scope of the necessary remedy as the effects of the earlier intentionally discriminatory violation. Columbus Board of Education

v. Penick, 443 U.S. 449, 459 (1979).[17]

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[17]The outcome in Dayton II turned precisely on this last-mentioned "rule of addition" -- i.e., on the need to sum the continuing segregative consequences of both the intent-measured original violation and the effects-measured "compounding" violations in order to determine the proper scope of the remedy. Dayton II, supra, 443 U.S. at 538-41. The district court in Dayton II had denied systemwide relief because the plaintiffs had not shown that the Dayton Board's intentional violations had continuing systemwide "incremental segregative effects." See id. at 540-42 (discussing Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), and Brinkman v. Gilligan, 446 F. Supp. 1232 (S.D. Ohio 1977)). Without disturbing the district court's conclusion, the Dayton II majority upheld the Sixth Circuit's grant of systemwide relief because the Board's post-Brown actions, though not intentionally segregative, violated the Board's affirmative duty and undeniably had systemwide effects: "The Court of Appeals was . . . quite justified in utilizing the Board's total failure to fulfill its affirmative duty -- and indeed its conduct resulting in increased segregation -- to trace the current, systemwide segregation back to the purposefully dual system of the 1950's . . . ." Dayton II, supra, 443 U.S. at 541-42 (citing Columbus, supra, 443 U.S. at 464-65; Keyes, supra, 413 U.S. at 211; Swann, supra, 443 U.S. at 21, 26-27). In concluding that the Board's conduct required systemwide relief, the Court summed the indeterminate effects of one intentional violation (a pre-1954 dual system) with the "systemwide" effects of five nonintentional violations (the post-1954 failure to dismantle prior segregative effects; student assignment practices; optional attendance zones; school construction and site selection; and grade struc-

In determining the scope of the State's responsibility for funding the single-district educational-enhancement remedy within the Kansas City District, the District Court applied the above principles of law and made the following findings: 1. Missouri administered a de jure "pre-Brown interdistrict system of locating dual schools" (Opn. of Gibson, J., 49a) and engaged in a series of "actions . . . discriminatory against blacks" that "continues to have a significant effect on the dual housing market in the Kansas City area." September 1984 Decision, 531a-32a, 601a-02a. 2. The area's segregation into one black district surrounded by eleven white districts has persisted ever since. See p. 4, supra.

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ture and organization). Dayton II, supra, 443 U.S. at 537-41 (quoting 583 F.2d at 258 and discussing Brinkman v. Gilligan, supra)). Then-Justice Rehnquist dissented on just this point. Dayton II, supra, 443 U.S. at 493, 502-04.

3. "State [officials] . . . had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. . . . This case is before this court simply because [State officials] have defaulted in their obligation . . . ." September 1984 Decision, 611a.

Chief among the State's post-1954 defaults was its enactment in 1957 of H.B. 171, which exempted Kansas City from the city-district coterminousness rule applied elsewhere in the State and allowed the City of Kansas City to quadruple in size and remain 73 percent **white** while the School District of Kansas City remained virtually static in size and became 74 percent **minority**.[18] Although concluding

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[18]See p. 6, supra. Although the discussion here focuses on H.B. 171, it applies as well to the other post-1954 segregative actions of the State, SSDs, KCMSD, and HUD. See pp. 22, 24-26 & nn.7, 8, supra; September 1984 Decision, 542a-56a.

that H.B. 171 and the State's other segregative line-drawing activities after Brown were not undertaken "with the intent to concentrate black students within the KCMSD," June 1984 Order, 334a-45a, the District Court relied on them nonetheless in requiring the State to fund a single-district remedy because, under Dayton II:

> "the measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."

September 1984 Decision, 605a (quoting Dayton II, supra, 443 U.S. at 538).

The District Court and Judge Gibson thus relied upon H.B. 171 and other defaults to require Missouri to fund single-district relief for the blacks the State unconstitutionally segregated into the Kansas City District. But both courts refused to rely upon those same undeniably

interdistrict defaults to require multi-district relief for those same black children and for the white children the State segregated into the rest of the City. Adopting the Fifth Circuit's view, both courts below concluded that "'Milliken, unlike Swann and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), does not sanction . . . an inference that the continued existence of one-race schools in a system that formerly practiced de jure segregation is a vestige of such segregation'" and accordingly does not impose an affirmative duty to dismantle the effects of de jure interdistrict segregation.[19]

Both opinions hold, therefore, that H.B. 171's undeniably continuing and city-wide effects are irrelevant absent a fresh

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[19]Opn. of Gibson, J. 22a, 55a (quoting Lee v. Lee County Board of Education, 639 F. 2d 1243, 1254 (5th Cir. 1981)); June 1984 Order, 285a, 339a, 510a. Contrary to the Fifth Circuit view

intent to discriminate; and both opinions deny relief on the otherwise inapplicable grounds (i) that the continuing effects considered are "insufficient" and (ii) that this is a people-moving, not a line-drawing, case. See pp. 27, 30-31 n.10, supra.

The above conclusion and the Fifth Circuit language on which it relies conflict with this Court's holdings in the Swann - Keyes - Dayton II line of intra-district decisions discussed above. They also conflict with this Court's and the Third Circuit's affirmances of inter-district relief in the Wilmington case.

In Wilmington, the pre-1954 de jure

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quoted above, Milliken does not reject the proposition that (1) an interdistrict violation in the past, coupled with (2) continuing interdistrict segregation thereafter, triggers an ongoing affirmative duty to dismantle that interdistrict segregation. Milliken simply holds that when the first of the two triggering conditions is absent -- because no interdistrict violation is present -- no interdistrict affirmative duty arises. Milliken, supra, 418 U.S. at 744-45. See id. at 741 n.19.

violation had the same two components as Missouri's pre-Brown violations in the present case: (1) a pre-1954 inter-district system of locating schools pursuant to which "the only high school in the County that accepted black students was . . . in Wilmington;" and (2) the State's invidious "assistance, encouragement, and authorization" of housing discrimination via enforcement of racially restrictive covenants, FHA practices, and public housing policies.[20]

The third major component of the Wilmington violation is also familiar to the present case -- i.e., the State's exclusion of the central city district

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[20]Evans v. Buchanan, 393 F. Supp. 428, 433-35 (D. Del.) (3-judge court), aff'd, 423 U.S. 963 (1975). See also Evans v. Buchanan, 582 F.2d 750, 762-63 (3d Cir. 1978) (en banc); Evans v. Buchanan, 416 F.2d 328, 341, 343 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977) (en banc). The identical violations in the present case are discussed at p. 12-22, supra.

from post-Brown legislation that otherwise could have led to the consolidation of that predominantly black district with the predominantly white districts surrounding it. Although the Wilmington trial court explicitly found that this post-Brown legislation was "not . . . purposefully . . . discriminatory," that Court -- in decisions affirmed summarily by this Court and twice by the Third Circuit en banc -- relied heavily on the legislation's post-Brown boundary- and segregation- preserving effects as a basis for interdistrict relief. The Wilmington courts did so because "[a]t the time the [legislation] was enacted, the State Board had not yet satisfied its obligation to eliminate the vestiges of de jure segregation in the Wilmington schools" and the legislation accordingly violated the State's affirmative "obligation to consider the racial consequences of [its] major educational

policy decisions."[21]

The Court should grant certiorari to resolve the conflict between the judgment below and the decisions of those Circuits that have applied the Swann-Keyes-Dayton II affirmative duty principles in interdistrict cases.

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[21]Evans v. Buchanan, 393 F. Supp. 428, 439, 441-42 (D. Del.) (3-judge court) (emphasis added) (citing Swann, supra, 402 U.S. at 16), aff'd, 423 U.S. 963 (1975)); Evans v. Buchanan, 416 F. Supp. 328, 340 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977) (en banc). Accord, Evans v. Buchanan, 582 F.2d 750, 765 (3d Cir. 1978) (en banc) (quoting Swann, supra, 402 U.S. at 26 and citing Keyes, supra, 413 U.S. at 208, 211 & n.17). Other Court of Appeals decisions relying on the violation of a prior segregator's affirmative duty as a basis for interdistrict relief are: Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107, 1121 (3d Cir. 1982) (citing Keyes, supra, 413 U.S. at 208-10); Morrilton School Dist. No. 32 v. United States, 606 F.2d 222, 227 (8th Cir. 1979) (en banc); Newburg Area Council, Inc. v. Board of Education, 510 F.2d 1358, 1360-61 (6th Cir. 1974) (citing, e.g., Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)). The position of the Seventh Circuit is unclear. Compare United States v. Board of School Comm'rs of the City of Indianapolis, 637 F.2d 1101, 1113 (7th Cir. 1980) (relying on Dayton II), with id. at 1113 n.24 (reserving question).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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